(3)

Supreme Court, U.S.
FILED
MAY 15 1997
OFFICE OF THE CLERK

No. 96-1329

In The

Supreme Court of the United States

October Term, 1996

MICHAEL J. LIGHTMAN, et al.,

Petitioners,

v.

ZENITH INSURANCE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF AND REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

RONALD M. GREENBERG*
RONALD M. GREENBERG,
a Professional Corporation

MITCHELL D. KAMARCK
ROSENFELD, MEYER & SUSMAN, L.L.P.
9601 Wilshire Blvd., 4th Fl.
Beverly Hills, CA 90210
(310) 858-7700

**Counsel of Record*

Attorneys for Petitioners
Michael J. Lightman, Excalibur Ventures, Inc., Lien Collections, Inc., James W. Eisenberg, James W. Eisenberg Medical Corporation, Robert Yale Libott and Robert Yale Libott, a Law Corporation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

QUESTION PRESENTED

In view of *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997), which was decided after petitioners filed their petition for a writ of certiorari, petitioners submit the following additional question so as to better focus the national implications of the question presented:

> Whether a federal statute which prohibits conduct that is also prohibited by state insurance law invalidates, impairs or supersedes that state insurance law under the McCarran-Ferguson Act because of a difference in the availability and the magnitude of the remedies that the federal statute provides.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

I. THE CALIFORNIA SUPREME COURT'S GRANTING OF PETITIONS FOR REVIEW IN *AMERICAN INTERNATIONAL ADJUSTMENT CO., INC. V. CRAWFORD* DOES NOT PRECLUDE THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI 1

II. THERE IS A REAL CONFLICT AMONG FEDERAL COURTS OVER WHETHER ALLOWING RICO SUITS IN AREAS REGULATED BY STATE INSURANCE LAW INVALIDATES, IMPAIRS, OR SUPERSEDES SUCH STATE INSURANCE LAW 2

III. RESPONDENT'S INTERPRETATION OF CALIFORNIA LAW IS FUNDAMENTALLY FLAWED BECAUSE IT WOULD ALLOW INSURERS TO BRING RICO SUITS AGAINST PERSONS PARTICIPATING IN CALIFORNIA'S WORKERS' COMPENSATION SYSTEM, BUT PRECLUDE THESE SAME PERSONS FROM BRINGING RICO SUITS AGAINST INSURERS 4

IV. THE FACT THAT THIS CASE INVOLVES WORKERS' COMPENSATION MAKES IT MOST APPROPRIATE FOR REVIEW 5

V. NO ISSUE EXISTS CONCERNING THE "BUSINESS OF INSURANCE," OR PETITIONERS' ALLEGED CONDUCT 6

CONCLUSION 8

TABLE OF AUTHORITIES

Page(s)

CASES

American International Adjustment Co., Inc. v. Crawford, 51 Cal.App.4th 1489 [60 Cal.Rptr.2d 123] (1997) 1

American International Group, Inc. v. Superior Court, 234 Cal.App.3d 749 [285 Cal.Rptr. 765] (1991), *cert. denied*, 504 U.S. 911 [112 S. Ct. 1994, 118 L. Ed. 2d 549] (1992) 1

Doe v. Norwest Bank Minnesota, N.A., 107 F.3d 1297 (8th Cir. 1997) 2, 3

Hudson v. McMillian, 503 U.S. 1 [112 S.Ct. 995, 117 L.Ed.2d 156] (1992) 6

Independence Indem. Co. v. Industrial Acc. Com., 2 Cal. 2d 397 [41 P.2d 320] (1935) 5

STATUTES

Cal. Ins. Code § 1871.4 5

Cal. Ins. Code § 1871.5 5

Cal. Ins. Code § 1871.7 5

Cal. Ins. Code § 1877 5

Cal. Lab. Code § 3201 5

I.

THE CALIFORNIA SUPREME COURT'S GRANTING OF PETITIONS FOR REVIEW IN *AMERICAN INTERNATIONAL ADJUSTMENT CO., INC. V. CRAWFORD* DOES NOT PRECLUDE THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI.

On April 30, 1997 the California Supreme Court granted petitions for review in the case of *American International Adjustment Co., Inc. v. Crawford*, 51 Cal.App.4th 1489 [60 Cal.Rptr.2d 123] (1997). (Appendix A). Despite that granting of review, the petition for a writ of certiorari should still be granted for the following reasons:

1. There is a conflict among federal courts as to the applicability of the McCarran-Ferguson Act to RICO suits which involve the business of insurance. See sections II and III of the petition for writ of certiorari and section II herein.

2. Since RICO is not involved in *Crawford*, it is unlikely that any opinion by the California Supreme Court will impact *American International Group, Inc. v. Superior Court*, 234 Cal.App.3d 749 [285 Cal.Rptr. 765] (1991), *cert. denied*, 504 U.S. 911 [112 S. Ct. 1994, 118 L. Ed. 2d 549](1992), wherein the California court of appeal held that application of RICO to California's workers' compensation system would invalidate, impair or supersede that system.

3. As shown in Appendix A, *Crawford's* review may be limited to the propriety of the sanctions awarded therein.

II.

THERE IS A REAL CONFLICT AMONG FEDERAL COURTS OVER WHETHER ALLOWING RICO SUITS IN AREAS REGULATED BY STATE INSURANCE LAW INVALIDATES, IMPAIRS, OR SUPERSEDES SUCH STATE INSURANCE LAW.

Any doubt over the existence of a conflict among the circuits with respect to whether allowing a RICO suit in an area highly regulated by state insurance law would invalidate, impair or supersede such state law has been put to rest by the recent decision in *Doe v. Norwest Bank Minnesota, N.A.*, 107 F.3d 1297 (8th Cir. 1997), which was decided after petitioners filed their petition. As stated by the court:

> Several courts addressing this question have concluded that the McCarran-Ferguson Act is not implicated by federal law that is substantively parallel to state law. *See Villafane-Neriz v. FDIC*, 75 F.3d 727, 736 (1st Cir. 1996) (Federal Deposit Insurance Act); *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1363 (6th Cir. 1995) (Fair Housing Act), *cert. denied*, ___U.S.___, 116 S.Ct. 973, 133 L.Ed.2d 893 (1996); *Merchants Home Delivery Serv., Inc. v. Frank B. Hall & Co.*, 50 F.3d 1486, 1492 (9th Cir.) (RICO), *cert. denied*, ___ U.S. ___, 116 S.Ct. 418, 133 L.Ed.2d 335 (1995); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 295-97 (7th Cir. 1992) (Fair Housing Act), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2335, 124 L.Ed.2d 247 (1993); *Thacker v. New York Life Ins. Co.*, 796 F.Supp. 1338, 1342-43 (E.D.Cal. 1992) (RICO). Other courts have disagreed, concluding that the intrusion of RICO's substantial damage provisions into a state's insurance regulatory program may so impair the state law as to

> bar the application of RICO. *See Kenty*, 92 F.3d at 392; (collateral protection insurance case; distinguishing *Nationwide*); *Ambrose v. Blue Cross & Blue Shield*, 898 F.Supp. 1153, 1165-68 (E.D.Va. 1995), *aff'd*, 95 F.3d 41 (4th Cir. 1996) (unpublished per curiam); *Everson v. Blue Cross & Blue Shield*, 898 F.Supp. 532, 544 (N.D.Ohio 1994); *Wexco Inc. v. IMC, Inc.*, 820 F.Supp. 194, 203-04; *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F.Supp. 820, 829 (N.D.Cal. 1992); *Senich v. Transamerica Premier Ins. Co.*, 766 F.Supp. 339, 341-42 (W.D.Pa. 1990) (collateral protection insurance case).

Id. at 1307.

Respondent seeks to avoid this obvious conflict by contending that every case which holds that use of a federal statute would invalidate, impair or supersede state law must be limited to its specific facts, and that absolutely no principles of law are to be gleaned therefrom. No authority for such limiting interpretation is provided. That is because none exists.

It should also be noted that every case cited above in *Doe* was decided in the 1990s. This shows the timeliness of the issue. As for the issue itself, the court in *Doe* stated:

> The precise degree of impairment of a state statute that is required to trigger the operation of the McCarran-Ferguson Act is not settled. . . . The issue presented here, therefore, is whether a federal statute that is essentially parallel in substance to a state statute may impair the state statute because of a difference in the availability and the magnitude of the remedies they provide.

Id. at 1307.

That issue is now ripe for resolution by the Court.

III.

RESPONDENT'S INTERPRETATION OF CALIFORNIA LAW IS FUNDAMENTALLY FLAWED BECAUSE IT WOULD ALLOW INSURERS TO BRING RICO SUITS AGAINST PERSONS PARTICIPATING IN CALIFORNIA'S WORKERS' COMPENSATION SYSTEM, BUT PRECLUDE THESE SAME PERSONS FROM BRINGING RICO SUITS AGAINST INSURERS.

Seeking to limit the purport of California legislation and case law which confines disputes over the propriety of claims, bills and liens generated within the California workers' compensation system to the Workers' Compensation Appeals Board ("WCAB"), respondent argues that California law only prohibits insurers within that system from being sued for their tortious conduct. However, according to respondent, nothing in California law precludes insurers from suing everyone else in the California workers' compensation system for their alleged tortious conduct.

Suffice it to say that not one statutory provision or judicial decision in California has come close to stating that mutuality of remedy is dead or non-existent in California in this context. Indeed, why would California even consider exempting only insurers in California's workers' compensation system from suit, but no one else who functions within that system? Respondent offers no explanation. Respondent's argument about California law is simply erroneous.

So too is respondent's argument that only the medical provider petitioners are within the ambit of California's workers' compensation system. In fact, all petitioners are regulated by and within the scope of California's workers' compensation system. *Independence Indem. Co. v. Industrial Acc. Com.*, 2 Cal. 2d 397 [41 P.2d 320] (1935). The provisions of California's Workers' Compensation Act, Cal. Lab. Code §§ 3201, *et seq.*, Appendix G to Petition for Writ of Certiorari, and Insurance Code provisions related thereto, Cal. Ins. Code §§ 1871.4, 1871.5, 1871.7 and 1877, *et seq.*, Appendix H to Petition for Writ of Certiorari, clearly apply to all petitioners. Respondent has no authority that contradicts this point.

IV.

THE FACT THAT THIS CASE INVOLVES WORKERS' COMPENSATION MAKES IT MOST APPROPRIATE FOR REVIEW.

Respondent suggests that "the idiosyncrasies of California's workers' compensation system scheme makes this case an inappropriate vehicle to address the general question of the degree to which insurance law preempts RICO pursuant to the McCarran-Ferguson Act." Respondent's Brief in Opposition at 14. With all due respect, it is precisely the "idiosyncrasies" of California's and other state's workers' compensation systems which makes this case appropriate for review.

Petitioners are not here concerned with any "general question" of how insurance law preempts RICO under McCarran-Ferguson. Rather, petitioners are concerned about whether, in view of McCarran-Ferguson, allowing a

federal RICO remedy will invalidate, impair or supersede California's workers' compensation system. That is a question of nationwide importance and, for the sake of the "transactional stability" necessary for a state's workers' compensation system, one that should be resolved by the Court. Otherwise, federal courts could become federal Workers' Compensation Appeals Boards, operating under a RICO umbrella, and forced to learn and apply the very "idiosyncrasies of [a state's] workers' compensation system scheme" that respondent argues makes this case inappropriate for review.

V.

NO ISSUE EXISTS CONCERNING THE "BUSINESS OF INSURANCE," OR PETITIONERS' ALLEGED CONDUCT.

In what can only be characterized as a desperate attempt to prevent the granting of certiorari, respondent spends about a fourth of its opposition discussing a non-issue, namely the "business of insurance." Respondent's Brief in Opposition at 14-18. Acknowledging that the court below never discussed this issue in its opinion, respondent nevertheless asks the Court to consider this issue as a basis for denying certiorari.

To begin with, it is well established that the Court does not consider initially an issue not first considered by the court below. *See Hudson v. McMillian*, 503 U.S. 1, 12 [112 S.Ct. 995, 1002, 117 L.Ed.2d 156] (1992). At best, if the issue is deemed important, the Court should remand the issue for consideration by the court below. Second, petitioners have not discussed the "business of insurance"

issue in their petition because it was a non-issue in the opinion of the court below. The issue, however, was raised in the court below. To the extent the Court has any interest in this issue, a copy of the portion of petitioner's brief in the court below which discussed it is attached as Appendix B. As can be seen, respondent is in error on this issue as well.

Finally, respondent's recitation of "Facts Material to the Consideration of the Question Presented" at pages 1-3 of Respondent's Brief in Opposition represents respondent's continuing efforts to elevate its *unproven allegations* to the level of proven facts. In the context of the jurisdictional issues raised by petitioners, these *unproven allegations* are irrelevant. Respondent's only purpose in mentioning these *unproven allegations* is to hopefully color the Court's attitude against petitioners because respondent has no substantive opposition to the jurisdictional issues raised by petitioners.

CONCLUSION

For the reasons stated above, and in their petition for a writ of certiorari, petitioners request that their petition be granted.

Respectfully submitted,

RONALD M. GREENBERG, Esq.
RONALD M. GREENBERG,
A Professional Corporation

MITCHELL D. KAMARCK, Esq.
ROSENFELD, MEYER & SUSMAN, LLP

Attorneys for Petitioners Michael J. Lightman, Excalibur Ventures, Inc., Lien Collections, Inc., James W. Eisenberg, James W. Eisenberg Medical Corporation, Robert Yale Libott and Robert Yale Libott, a Law Corporation

APPENDIX A

ORDER

Cite as 97 Daily Journal D.A.R. 5576

AMERICAN INTERNATIONAL ADJUSTMENT CO.,
Appellant

v.

BYRON CRAWFORD,
Respondent.

C.A. 4th, Div. 3, No. G015835
No. S059135
California Supreme Court
Filed April 30, 1997

Petitions for review GRANTED.

George, Chief Justice
Mosk, Associate Justice
Kennard, Associates Justice
Baxter, Associate Justice
Werdegar, Associate Justice
Chin, Associate Justice
Brown, Associate Justice

(**Editor Note** – For your convenience we reprint below the **Daily Journal's** Ruling Column brief which summarized the earlier decision of the lower court.)

WORKERS' COMPENSATION

Workers' Compensation Insurer Isn't Sanctionable for Filing Tort Action and Administrative Complaint for Same Alleged Fraud.

The *C.A. 4th* has found that although workers' compensation was the exclusive remedy for fraudulent billing allegations, sanctions were unwarranted for also filing a similarly-based tort complaint.

American International Adjustment Corp., a workers' compensation insurer, filed a complaint against Professional Consultation Services and four other Los Angeles medical clinics allegedly owned by Byran Crawford, a doctor. The complaint generally asserted that there were double billings, unrendered or unauthorized medical services, fraudulent diagnoses and premature medical-legal evaluations in 158 separate workers' compensation claims. American sought compensatory and punitive damages and injunctive relief. American also filed a petition with the Workers' Compensation Appeals Board (WCAB) seeking restitution of the same $519,369. Professional claimed that the WCAB had exclusive jurisdiction. The trial court treated Professional's response as a demurrer and, on its own motion, amended the response to request sanctions, without stating specific grounds. The trial court sustained the demurrers without leave to amend based on the WCAB's exclusive jurisdiction. It declined to hear oral arguments as to the sanctions and imposed $60,000 in sanctions based on the filings in two forums. Professional challenged American's appeal of the sanctions order as frivolous and "outrageously" requested $68,000 for costs and attorney fees.

The *C.A. 4th* affirmed in part and reversed in part. The WCAB's exclusive jurisdiction is not limited to employees and employers and extends to all suits regarding compensation and payment of benefits to injured workers. "Just as the WCAB's jurisdiction covers bad faith or fraud claims against workers' compensation carriers, so too it covers fraud claims against medical or medical-legal line claimants. Fraudulent workers' compensation claims should be stopped at the source, in the

workers' compensation system. Medical clinics that submit false medical-legal evaluations can be detected and halted under existing law, which sets up a tripartite scheme involving the WCAB, the insurance commissioner and public prosecutors." However, American did not engage in sanctionable conduct by filing the tort complaint. The complaint was not objectively frivolous and presented a matter of first impression of arguable merit. The Legislature had not expressed a clear intent as to which intentional torts are pre-empted by workers' compensation. Although much of the conduct by American's trial attorneys was "disquieting," it was important that they should have been given a full and fair opportunity to confront the charges and explain their actions. They were denied adequate notice and the sanctions could not stand. No sanctions were warranted on appeal.

American International Adjustment Co. v. Crawford, C.A. 4th, No. G015835, filed January 9, 1997 by Crosby, J.

The full text of this case appears in 97 Daily Journal D.A.R. 423, January 13, 1997.

State Supreme Court Highlights

During their conference, the justices took the following actions:

GRANTS

WORKERS' COMPENSATION: The justices agreed to decide whether a workers' compensation insurer should have been sanctioned for filing a massive tort suit against a group of medical clinics, accusing them of fraudulent billing practices in 158 compensation claims.

American International Adjustment Corporation filed the suit in 1993 against five clinics allegedly controlled by Dr. Byron Crawford, claiming it paid $519,369 in fraudulent billings. Three days later, AIAC filed a restitution petition for the same amount with the Workers Compensation Appeals Board.

But Orange County Judge Robert J. Polis not only denied AIAC's request for a preliminary injunction, he imposed sanctions on his own motion for $62,074 for filing suit in bad faith.

On Jan. 9, the Court of Appeal in Santa Ana upheld Polis' decision that AIAC's suit was barred by the exclusive remedy provided by the workers' compensation system, but said he failed to give sufficient notice of the basis for the sanctions.

Writing for the court, Justice Thomas Crosby said the workers' compensation system is the place to hear AIAC's complaint, not the court system. "It is for this

reason we are unwilling to sanction the crude, blunderbuss type of tort weapon plaintiff proposes," Crosby wrote.

Voting to review the appeal court decision in *American International Adjustment Co. v. Crawford*, 51 Cal.App.4th 1489 (1997), were Chief Justice Ronald M. George and Justices Stanley Mosk, Joyce L. Kennard, Marvin R. Baxter, Kathryn Mickle Werdegar, Ming W. Chin and Janice R. Brown.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ZENITH INSURANCE COMPANY, a California corporation, Appellant, v. JAMES W. EISENBERG, an individual; et al., Appellees,	Ninth Circuit Nos. 94-55983 94-56138 94-56188 District Court No. CV-92-6267 AAH Central District of California
LIEN COLLECTIONS, INC., Counter-Complainant and Cross-Appellant, v. ZENITH INSURANCE COMPANY, Counter-Defendant and Cross-Appellee,	
JAMES W. EISENBERG MEDICAL CORPORATION, Counter-Complainant and Cross-Appellant, v. ZENITH INSURANCE COMPANY, Counter-Defendant and Cross-Appellee.	

APPELLEES' OPENING BRIEF

* * *

B. Activities Occurring Within the Claims Adjustment Process Constitute The Business of Insurance.

The United States Supreme Court has recognized that the "claims adjustment process" involves the "business of insurance." *Union Labor Life Ins. Co. v. Pireno,* 458 U.S. 119 [102 S.Ct. 3002, 73 L.Ed.2d 647] (1982). In *Union Labor,* a chiropractor sought injunctive relief under federal antitrust laws against Union Labor's use of a Peer Review Committee to determine the propriety of chiropractic charges. Union Labor moved for summary judgment on the basis that the Peer Review Committee was part of the "business of insurance" and, therefore, the chiropractors' federal actions were barred by the McCarran-Ferguson Act. The majority of the Court disagreed and held that the use of the Peer Review Committee was ancillary to the claims adjustment process because the Committee was not the claims adjuster and its recommendations were non-binding. However, the Court expressly noted:

> Unlike activities that occur wholly within the insurance industry – *such as the claims adjustment process itself* – the ancillary peer review practices at issue in these cases "involve parties wholly outside the insurance industry." *See Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. at 231, 99 S.Ct. at 1083. Thus peer review

> falls afoul of the third Royal Drug criterion in a way in which pure claims adjustment activities cannot.

Id., 102 S.Ct. at 3011 n. 8. (Emphasis added.)

Other courts have similarly held that "the adjustment and settling of claims is a practice traditionally regarded as the business of insurance." In *Manasen v. California Rental Services*, 424 F.Supp. 657, 666 (N.D. Cal. 1976), *reversed on other grounds*, 638 F.2d 1152 (9th Cir. 1979), the court stated:

> The teaching of these cases is that the protection afforded by the McCarran Act is not strictly limited to insurance companies. The McCarran Act is concerned with the "business of insurance," and thus it is the nature of the challenged conduct which must be examined in determining whether the exemption applies. *Royal Drug Co. v. Group Life & Health Insurance Co., supra.* The authorities further reflect the fact that a wide variety of activities which have a substantial effect on rate-making, including the settlement of claims and the limitations of costs, are embraced within the definition of "business of insurance."

See also, Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80, 83 (3rd Cir. 1973); *Lee v. Prudential Ins. Co. of America*, 673 F. Supp. 998, 1001 (N.D. Cal. 1987) (California's claims handling statute involves the "business of insurance" because it "explicitly mandates the manner in which insurers shall settle claims, and

therefore is specifically directed :to the enforcement of the insurance policy").[4]

In this action, Zenith seeks damages caused by Appellees' alleged fraudulent use of the workers' compensation claims adjustment process. *See* Zenith's RICO Case Statement, C.R. 89, Appellant's E.R. 9, at 19-35. Zenith alleges that Appellees (i) abused the "90630 RVS code," *id.* at 19-22; (ii) abused the "90642 and 90643 RVS codes," *id.*, at 22-25; (iii) abused the "90803 RVS code," *id.*, at 25-26; (iv) used "multiple RVS codes," *id.*, at 25-28; (v) used fraudulently "a different RVS code"; *id.*, at 29; and, (vi) misrepresented medical-legal treatment, *id.*, at 34-35. All of these claims involve the interpretation of California's Official Medical Fee Schedule as it existed prior to July, 1993, or the reasonableness of medical treatment, functions delegated to the WCAB in the workers' compensation mandatory claims adjustment process. The

---

[4] Commentators have expressed the opinion that claims adjustment and settlement are the single most important element of the "business of insurance." *See* J. Wickman, *Evaluating the Health Insurance Risk* 57 (1965) ("[u]p until the time there is a claim and a payment is made, the only tangible evidence of insurance is a piece of paper. In other words, the real product of insurance is the claims proceeds"); Butler, *Loss Adjustment in Fire Insurance, in Property and Liability Insurance Handbook* 219 (J. Long & D. Gregg eds. 1965) ("[t]he adjustment (including payment) of claims represents the final act in the insurance process"); C. Cissley, *Claims Administration: Principles and Practices III* (1980) ("[c]laim administration is the best link in the process of insurance – a process that begins with actuarial analysis and continues through sales, underwriting, investment, and policy services . . . "); Case Comment, 65 Minn. L. Rev. 1187, 1201-02 (claims adjustment should be regarded as the "business of insurance").

very essence of this action involves determining exactly what, if anything, Appellees are entitled to on their liens. Such a determination is clearly part of the "business of insurance." *See e.g., Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 324, 324-325 (D.C. Cir. 1982) *cert. denied* 459 U.S. 839 [103 S.Ct. 86, 74 L.Ed.2d 81] (1982). (" . . . the alleged agreement pertains to the adjusting and settling of claims, a practice traditionally regarded a part of the insurance business").[5]

Now, instead of allowing the WCAB to determine both the propriety of the billings and the extent of Zenith's duties to indemnify medical providers, Zenith requests that a United States District Court conduct such review for over 45 workers' compensation claims in the guise of a RICO action.[6] Zenith seeks to employ both

---

[5] Zenith admits that all of the above-described alleged predicate acts occurred within the context of the claims adjustment process mandated by the California Workers' Compensation Act:

> LCI applies to the Workers' Compensation Appeals Board (the "WCAB") for adjudication of the liens and prosecutes the liens at hearings and settlement conferences. Where extensive litigation before the WCAB or formal legal expertise is required, Libott Law, under the name Libott Law Office, represents Eisenberg Medical's interest.

Zenith's RICO Case Statement, C.R. 89, Appellant's E.R. 9, at 107.

[6] The 45 cases mentioned by Zenith are but a prelude to the thousands and thousands of cases embodied in its suit. For example, Zenith has requested through discovery information

federal court procedures and RICO remedies to supersede the claims handling and adjustment function of the WCAB. However, the McCarran-Ferguson Act precludes the District Court from supplanting the WCAB's function as claims adjuster of medical liens.

Zenith's argument that Appellees' activities in the claims adjustment process do not constitute the "business of insurance" is premised on its erroneous claim that: "[t]he McCarran-Ferguson Act is to be narrowly construed. . . . " Zenith's Opening Brief, at 24. In support of this claim Zenith cites *United States v. Title Ins. Rating Bureau of Ariz.*, 700 F.2d 1247 (9th Cir. 1983), *cert. denied* 467 U.S. 1240 [104 S.Ct. 3509, 82 L.Ed.2d 819] (1984), a 1983 antitrust case. As the Supreme Court made clear in *Fabe*, the strict construction of the "business of insurance" applies *only* in the antitrust context, while a broad construction must be applied where state law regulation of activities in the "business of insurance" is involved. *Fabe, supra,* 113 S.Ct. at 2209-2210.

Next, Zenith attempts to dismiss the application of *Fabe* by claiming Zenith's allegations of "fraud" necessarily remove Appellees' conduct from the business of insurance. Pursuant to Zenith's argument, the McCarran-Ferguson Act could never bar a RICO claim premised on fraud. This is incorrect. *See e.g., American International*

---

relating to workers' compensation claims dating back to January 1, 1983. (C.R.113, Exhibit E, Appellees' E.R. 7).

Moreover, many of the 45 claims referenced in Zenith's suit were settled or adjudicated within the California workers' compensation system by the time the District Court ordered the case dismissed. (C.R. 115, Appellant's E.R. 3, at 769-773).

Group, Inc. v. Superior Court, supra, (McCarran-Ferguson Act barred application of RICO); *LeDuc v. Kentucky Central Life Ins. Co., supra,* (McCarran-Ferguson Act barred application of RICO). In *Wexco Inc. v. IMC, Inc.,* 820 F.Supp. 194, 201 (M.D. Pa. 1993), the court dismissed the identical argument as inconsistent with applicable Supreme Court precedents:

> For its own reasons, this court agrees with Defendants that the "fraud is not the business of insurance" approach should not be followed. When a plaintiff invokes an action under a relevant federal law against insurance entities, it is presumably because the plaintiff believes that the entities have acted improperly, in violating that law. Limiting the court's McCarran-Ferguson examination of those entities' activities to their wrongful character is inconsistent with the existence of Supreme Court precedents directing courts on the proper examination to make in such circumstances. Given that wrongful conduct is always alleged, an approach that concludes that wrongful conduct is never the "business of insurance" would leave no occasion for. courts to apply the principles that the Supreme Court has provided. To say that "fraud is never the business of insurance" is to start down that road.

See also United States Borax and Chemical Corp. v. Superior Court, 167 Cal.App.3d 406, 410 [213 Cal.Rptr. 155] (1985), wherein allegations of wrongdoing were insufficient to take the case out of the Workers' Compensation System (" . . . the Legislature, in enacting the workers'

compensation system, had intended to vest therein jurisdiction of all such work-related claims, notwithstanding pleading embellishments about fraud.")

In sum, Zenith's self-serving hyperbole and conclusory allegations cannot transmute the "business of insurance" into something else.

* * *